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April 21, 2017

Via ECF & Federal Express
Honorable Naomi Reice Buchwald
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF NEW YORK
United States Courthouse
500 Pearl Street
New York, New York 10007-1312

Re: Goldberg Cohen, LLP v. Luv n' care, Ltd., et al.
Civil Action No.: 1:16-cv-06576
United States District Court – Southern District of New York

Dear Judge Buchwald:

Pursuant to Your Honor's Individual Practices, Defendants Luv n' care, Ltd. and Admar International, Inc., respectfully submit this letter with its Memorandum in Opposition to Plaintiff's Motion for Summary Judgment [Dkt. 31].

Plaintiff's Motion for Summary Judgment seeks to enforce an alleged oral amendment to the parties' written Retainer Agreement. Defendants submit the declaration of their CEO, Eddie Hakim, who states unequivocally that there never was any amendment to the Retainer Agreement, oral or otherwise. Hakim Dec. ¶ 13. Defendants further establish that Plaintiff was fully compensated for its work in the Jackel Case and in fact it is Plaintiff who has breached the Retainer Agreement by failing to return over $1 million in fees advanced but not earned. Hakim Dec. ¶¶ 14, 17. Defendants' also demonstrate, as a matter of law, that the parties' written Retainer Agreement could not be orally amended.

While Plaintiff fails to make its case on both the facts and the law, Plaintiff's motion also fails procedurally to even meet the basic summary judgment requirements. Plaintiff has provided almost no testimonial support for any of the many factual allegations in its motion. Plaintiff instead improperly relies on a series of documents that it attempts to connect with unsworn attorney argument instead of proper factual evidence. Much if not almost all of what is stated in Plaintiff's memorandum is unsupported attorney argument concerning disputed facts.

The testimony of Defendants' CEO and their General Counsel, contradicting the attorney argument in Plaintiff's memorandum, is unrebutted, uncontroverted and disputes almost every material fact necessary to support Plaintiff's motion. Plaintiff has also attempted to seek full summary judgment on all of Defendants' counterclaims in violation of this Court's clear instructions at the pre-motion conference. Like its flawed motion for summary judgment on the alleged oral amendment, Plaintiff's effort to defeat Defendants' counterclaims is not based on any factual evidence, only attorney argument, is contrary to the established New York law and is factually disputed by unrebutted and uncontroverted testimony submitted by Defendants.

The fundamental issue before the Court on this motion is whether there was an oral amendment to the parties' written Retainer Agreement despite a clause expressly prohibiting oral amendments. There is no dispute that the written Retainer Agreement was drafted by Goldberg Cohen and included the provision that "[n]o amendment or modification will be effective unless set forth in writing and signed on Your behalf and GC." It is also undisputed that there is "no amendment . . . set forth in writing and signed" by LNC and Goldberg Cohen. What Goldberg Cohen have submitted is alleged "evidence" of an oral agreement, not the agreement itself.

Despite the clear and unequivocal contractual provisions, Plaintiff contends there was an oral amendment. Defendants dispute there ever was any amendment, oral or otherwise, to the written Retainer Agreement. Hakim Dec. ¶ 13. Plaintiff's only support for the alleged oral amendment is a brief they wrote seeking attorneys' fees in the Louisiana State Court Jackel Case.

Defendants have established by unrebutted and uncontroverted testimony that the brief was prepared solely by Plaintiff and its content misrepresented to LNC's General Counsel in a scheme by Goldberg Cohen to increase the attorneys' fees award sought in the Jackel Case. Defendants contend that the brief does not meet the requirements of New York Gen. Oblig. Law § 15-301(1) as it is not an "agreement" but at most, as admitted by Plaintiff, merely an indication of an alleged agreement. Defendants further contend that the single document relied upon by Plaintiff does not constitute a judicial admission and cannot constitute a writing signed by LNC as its content was fraudulently misrepresented by Plaintiff in circumstances Plaintiff knew were unlikely to be revealed. Most significantly, Plaintiff's principals, Lee Goldberg and Morris Cohen, have not submitted sworn testimony that there was an oral agreement, they have not offered any testimony denying Defendants' allegations that the attorneys' fees brief was false, in fact they have offered no testimony contradicting or rebutting any of the factual testimony submitted by Defendants that refute Plaintiff's claims.

Defendants respectfully submit that the law and facts mandate that Plaintiff's motion be denied.

Defendants request oral argument.

Very truly yours,

Robert M. Chiaviello, Jr.

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CC: Plaintiff's Counsel